

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

WILLIE R. HARRIS, ) Case No. CV 06-5031-JTL  
)  
Plaintiff, )  
) MEMORANDUM OPINION AND ORDER  
v. )  
)  
MICHAEL J. ASTRUE, )  
Commissioner of Social )  
Security, )  
)  
Defendant. )  
)

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**PROCEEDINGS**

On August 11, 2006, Willie R. Harris ("plaintiff") filed a Complaint seeking review of the Commissioner's denial of her application for Social Security Disability and Supplemental Security Income benefits. On October 3, 2006, plaintiff filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. On October 10, 2006, Michael J. Astrue ("defendant") filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. Thereafter, on March 1, 2007, defendant filed an Answer to Complaint. On May 25, 2007, the parties filed their Joint Stipulation.

The matter is now ready for decision.

## BACKGROUND

On May 6, 2004, plaintiff filed an application for supplemental social security benefits. (Administrative Record ["AR"] at 305-07). Plaintiff alleged that beginning on September 30, 2003, she was unable to work because she suffered from immobility caused by intense pain and swelling in her neck, head, shoulders, upper back, arms, thumbs, and hands that was a result of carpal tunnel syndrome, tendonitis, and a bi-lateral cervueal [sic] sprain. (AR at 103). The Commissioner denied plaintiff's application for benefits. (AR at 30-35).

On or about August 31, 2004, plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR at 41). On December 7, 2005, the ALJ conducted a hearing in Downey, California. (See AR at 320-339). Plaintiff appeared at the hearing with counsel and testified. (*Id.*). Joseph Torres, a vocational expert, also testified at the hearing. (See AR at 332-338).

On January 25, 2006, the ALJ issued his decision denying benefits to plaintiff. (AR at 19-28). The Appeals Council denied plaintiff's timely request for review of the ALJ's decision. (AR at 6-8).

Thereafter, plaintiff appealed to the United States District Court.

## **PLAINTIFF'S CONTENTIONS**

Plaintiff makes the following claims:

1. The ALJ failed to properly resolve the conflicts between the vocational expert's testimony and the information contained in the Department of Labor's Dictionary of Occupational Titles ("DOT").

2. The ALJ erred in failing to apply the Medical Vocational Rules (the "grids").

3. The ALJ failed to give the vocational expert a complete and accurate hypothetical regarding plaintiff's limitations.

4. The ALJ failed to give proper weight to the opinion of the treating physician.

5. The ALJ improperly rejected plaintiff's subjective pain testimony.

## **STANDARD OF REVIEW**

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and whether the proper legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla" but less than a preponderance. Richardson v. Perales, 402 U.S. 389, 401 (1971); Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at 401. This Court must review the record as a whole and consider adverse as well as supporting evidence. Morgan v. Comm'r, 169 F.3d 595, 599 (9th Cir. 1999). Where evidence is susceptible to more than one rational interpretation, the ALJ's decision must be upheld. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

## DISCUSSION

#### A. The Sequential Evaluation

A claimant is disabled under Title II of the Social Security Act if she is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or...can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §

1      423(d)(1)(A). The Commissioner has established a five-step sequential  
 2 process to determine whether a claimant is disabled. 20 C.F.R. §§  
 3 404.1520, 416.920.

4            The first step is to determine whether the claimant is presently  
 5 engaging in substantially gainful activity. Parra v. Astrue, 481 F.3d  
 6 742, 746 (9th Cir. 2007). If the defendant is engaging in  
 7 substantially gainful activity, disability benefits will be denied.  
 8 Bowen v. Yuckert, 482 U.S. 137, 141 (1987). Second, the ALJ must  
 9 determine whether the claimant has a severe impairment. Parra, 481  
 10 F.3d at 746. Third, the ALJ must determine whether the impairment is  
 11 listed, or equivalent to an impairment listed, in Appendix I of the  
 12 regulations. Id. If the impediment meets or equals one of the listed  
 13 impairments, the claimant is presumptively disabled. Bowen, 482 U.S.  
 14 at 141. Fourth, the ALJ must determine whether the impairment  
 15 prevents the claimant from doing past relevant work. Parra, 481 F.3d  
 16 at 746. If the claimant cannot perform her past relevant work, the  
 17 ALJ proceeds to the fifth step and must determine whether the  
 18 impairment prevents the claimant from performing any other  
 19 substantially gainful activity. Parra, 481 F.3d at 746.

20            The claimant bears the burden of proving steps one through four,  
 21 consistent with the general rule that at all times, the burden is on  
 22 the claimant to establish her entitlement to disability insurance  
 23 benefits. Id. Once this *prima facie* case is established by the  
 24 claimant, the burden shifts to the Commissioner to show that the  
 25 claimant may perform other gainful activity. Lounsbury v. Barnhart,  
 26 468 F.3d 1111, 1114 (9th Cir. 2006).

27        ///  
 28        ///

1     **B. The Vocational Expert's Testimony**

2       In her first claim, plaintiff alleges that the ALJ failed to  
 3 properly resolve the conflicts between the vocational expert's  
 4 testimony and the information contained in the Department of Labor's  
 5 Dictionary of Occupational Titles ("DOT"). Plaintiff argues the  
 6 alleged differences triggered the ALJ's duty to develop the record and  
 7 the ALJ failed to meet this duty. Defendant concedes that the  
 8 vocational expert mixed up the job requirements, but argues the mix-  
 9 ups are irrelevant because the vocational expert testified that  
 10 plaintiff's skills were readily transferable to both of the  
 11 occupations discussed. Defendant argues that the vocational expert's  
 12 error regarding the DOT numbers cannot be reasonably characterized as  
 13 a conflict with the DOT that the ALJ was duty bound to explore.

14      An ALJ may not rely on a vocational expert's testimony regarding  
 15 the requirements of a particular job without first inquiring whether  
 16 the testimony conflicts with the DOT. Massachi v. Astrue, 486 F.3d  
 17 1149; 2007 U.S. App. LEXIS 11115, \*7 (9th Cir. May 11, 2007). Social  
 18 Security Regulation 00-4p<sup>1</sup> provides:

19           When a VE [vocational expert] or VS [vocational  
 20 specialist] provides evidence about the  
 21 requirements of a job or occupation, the  
 22 adjudicator has an affirmative responsibility to  
 23 ask about any possible conflict between that VE

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24  
 25       <sup>1</sup> Social Security Rulings are issued by the Commissioner to  
 26 clarify the Commissioner's regulations and policies. Bunnell v.  
Sullivan, 947 F.2d 341, 346 n.3 (9th Cir. 1991)(en banc).  
 27 Although they do not have the force of law, they are,  
 nevertheless given deference "unless they are plainly erroneous  
 28 or inconsistent with the Act or regulations." Chavez v. Dep't of  
Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996).

1           or VS evidence and information provided in the  
 2           DOT. In these situations, the adjudicator will:  
 3           [a]sk the VE or VS if the evidence he or she has  
 4           provided conflicts with information provided in  
 5           the DOT; and [i]f the VE's or VS's evidence  
 6           appears to conflict with the DOT, the adjudicator  
 7           will obtain a reasonable explanation for the  
 8           apparent conflict.

9           If the ALJ does not ask the vocational expert whether his  
 10          testimony conflicts with the DOT, the reviewing court cannot determine  
 11          whether substantial evidence supports the ALJ's findings. Massachi,  
 12          486 F.3d 1149; 2007 U.S. App. LEXIS 11115 at \*11-12 (citing Prochaska  
 13          v. Barnhart, 454 F.3d 731, 736 (7th Cir. 2006)); see also Travis v.  
 14          Astrue, 477 F.3d 1037, 1042 (8th Cir. 2007) ("This court will not  
 15          substitute its opinion for the ALJ's, who is in a better position to  
 16          gauge credibility and resolve conflicts in evidence.").

17           Here, the ALJ did not ask the vocational expert whether his  
 18          testimony conflicted with the DOT, and, if so, whether there was a  
 19          reasonable explanation for the conflict. (See AR at 320-329). As a  
 20          result, the Court cannot determine whether substantial evidence  
 21          supports the ALJ's conclusion that plaintiff had transferable skills  
 22          or the ALJ's step-five conclusion that plaintiff could perform other  
 23          substantially gainful activity.

24           In fact, there were inconsistencies between the vocational  
 25          expert's testimony and the DOT. The vocational expert testified that  
 26          an information clerk, DOT code 237.367-018, was a level three specific  
 27          vocational preparation ("SVP") occupation, which indicates it would  
 28          take a typical worker over one month and up to and including three

1 months to learn the techniques, acquire the information, and develop  
 2 the facility needed for average performance in a specific job-worker  
 3 situation. However, according to the DOT, the SVP for an information  
 4 clerk is a level two, which includes anything beyond a short  
 5 demonstration up to and including a one month period.

6 Similarly, the vocational expert testified that the clerical  
 7 information clerk position, DOT code 237.367-022, is an SVP three  
 8 occupation, an unskilled job that takes about one month to learn, (AR  
 9 at 338), while the DOT states the position has an SVP of four, which  
 10 indicates it would take the typical worker over three months and up to  
 11 and including six months to learn the techniques, acquire the  
 12 information, and develop the facility needed for average performance.

13 Given that the ALJ failed to inquire whether the vocational  
 14 expert's testimony conflicted with the DOT, the ALJ erred in relying  
 15 on the vocational expert's testimony. Because an actual conflict does  
 16 exist, the Court can affirm the ALJ's decision only if the record  
 17 contains persuasive evidence to support the deviation. Pinto v.  
 18 Massanari, 249 F.3d 840, 845 (9th Cir. 2001). Moreover, the Ninth  
 19 Circuit requires either specific findings of fact regarding a  
 20 plaintiff's residual functionality or inferences drawn from the  
 21 context of the vocational expert's testimony in support of a deviation  
 22 from the DOT. Light v. Comm'r of the Social Security Admin., 119 F.3d  
 23 789, 793 (9th Cir. 1997).

24 Here, the ALJ relied heavily on the vocational expert's testimony  
 25 (see AR at 26-28), but did not provide reasons for adopting the  
 26 vocational expert's deviation from the DOT. The Court cannot identify  
 27 any persuasive evidence in the record to justify this deviation.  
 28 Accordingly, the ALJ erred in failing to ask the vocational expert if

1 his testimony conflicted with the DOT and in relying on the vocational  
 2 expert's testimony without making specific findings to explain the  
 3 deviation from the DOT.

4     **C. The ALJ's Use of Grids**

5       In her second claim, plaintiff argues that the vocational  
 6 expert's testimony was insufficient to support a denial of benefits  
 7 and the ALJ should have used the Commissioner's medical-vocational  
 8 guidelines ("grids") to find plaintiff disabled under 20 C.F.R. Part  
 9 404, Subpart P, Appendix 2, § 201.06.

10      An ALJ may apply the grids to determine a claimant's residual  
 11 functional capacity. See Widmark v. Barnhart, 454 F.3d 1063, 1069  
 12 (9th Cir. 2006). However, an ALJ should rely on grids only when they  
 13 accurately and completely describe the claimant's abilities and  
 14 limitations. Id.

15      Generally, an ALJ should obtain a vocational expert's opinion  
 16 where the plaintiff suffers from only severe non-exertional  
 17 impairments or suffers from a combination of severe exertional and  
 18 non-exertional impairments. Lounsbury, 468 F.3d at 1115. Non-  
 19 exertional (not strength related) limitations include mental, sensory,  
 20 postural, manipulative, and environmental limitations. 20 C.F.R. Part  
 21 404, Subpart P, Appendix 2, § 200.00(3); Derosiers v. Sec'y of Health  
& Human Servs., 846 F.2d 573, 579 (9th Cir. 1988). In contrast, where  
 23 a claimant suffers primarily from an exertional impairment limiting  
 24 the plaintiff's strength to sit, stand, walk, carry, lift, push, or  
 25 pull, the use of the grids without a vocational expert's testimony may  
 26 be proper. See Cooper v. Sullivan, 880 F.2d 1152, 1156 (9th Cir.  
 27 1989).

1       In his decision, the ALJ noted plaintiff was 58 years old at the  
2 time of the decision and, as such, an individual closely approaching  
3 advanced age, has more than a high school education, and a skilled  
4 work background. (AR at 26). The ALJ adopted the testimony of the  
5 vocational expert that plaintiff had skills that were easily  
6 transferable. (Id.). Relying on this testimony, the ALJ found  
7 plaintiff could perform the demands of the full range of sedentary  
8 work and found plaintiff to be "not disabled" under Medical Vocational  
9 Rule 201.07.

10     Because plaintiff suffered from only severe exertional  
11 limitations, the ALJ's use of the grids was proper. (See AR at 21).  
12 The ALJ relied on the vocational expert's testimony and concluded that  
13 because plaintiff did have transferable skills he was "not disabled"  
14 under Medical Vocational Rule 201.07. However, as discussed above,  
15 the ALJ erred in failing to ask the vocational expert if his testimony  
16 conflicted with the DOT, and there are no findings to explain his  
17 deviation from the DOT. Accordingly, the ALJ erred in relying on the  
18 vocational expert's determination that plaintiff had transferable  
19 skills in applying Medical Vocational Rule 201.07 instead of Rule  
20 201.06, which supports a finding of "disabled."

21 **D. The ALJ's Hypothetical to the Vocational Expert**

22 Plaintiff claims that the ALJ erred by providing the vocational  
23 expert with an inaccurate hypothetical regarding plaintiff's  
24 limitations. Defendant argues, however, that the ALJ did not err in  
25 propounding a hypothetical to the vocational expert that differed from  
26 the final RFC because the ALJ's hypothetical stated plaintiff had the  
27 capacity to perform a full range of sedentary work, which was more  
28 restrictive than the ALJ's RFC findings. (AR at 27).

1       In order for a vocational expert's testimony to constitute  
 2 substantial evidence, the hypothetical question posed must consider  
 3 all of the claimant's limitations. Andrews v. Shalala, 53 F.3d 1035,  
 4 1044 (9th Cir. 1995). While the ALJ need not include every alleged  
 5 impairment in his hypothetical, he must make specific findings  
 6 explaining his rationale for disbelieving any subjective complaints  
 7 that are not included. Copeland v. Bowen, 861 F.2d 536, 540 (9th Cir.  
 8 1988).

9       As discussed above, the credibility of the vocational expert was  
 10 at issue. Therefore, the ALJ erred in relying on the vocational  
 11 expert's testimony regarding the plaintiff's RFC.

12 **E. ALJ's Consideration of the Treating Physician's Opinion**

13 Plaintiff argues that the ALJ erred in rejecting the opinion of  
 14 Philip Sobol, M.D., plaintiff's treating physician, and in failing to  
 15 meet his duty to develop the record. Defendant argues that the ALJ  
 16 properly rejected Dr. Sobol's opinion because his assessment of  
 17 plaintiff's condition was inconsistent with the bulk of the medical  
 18 evidence and the opinions of Elizabeth Sander, M.D., Allen I. Salick,  
 19 M.D., and Gregg H. Small, M.D.

20       More weight is given to the opinion of a treating physician than  
 21 that of a nontreating physician because a treating physician is  
 22 employed to cure and has a greater opportunity to know and observe the  
 23 patient as an individual. Andrews, 53 F.3d at 1040-41. The ALJ may  
 24 reject an uncontested opinion of a treating physician only for  
 25 clear and convincing reasons. Id. at 1041. Where the opinion of the  
 26 treating physician is contradicted by another doctor, the opinion of  
 27 the treating physician may not be rejected without providing "specific  
 28 and legitimate reasons" supported by substantial evidence in the

1 record for doing so. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.  
 2 1996).

3 In a social security case, the ALJ has an independent duty to  
 4 fully and fairly develop the record and assure that the plaintiff's  
 5 interests are considered. Tonapetyan v. Halter, 242 F.3d 1144, 1151  
 6 (9th Cir. 1991). The ALJ's duty to develop the record exists even  
 7 when the claimant is represented by counsel. See Brown v. Heckler,  
 8 713 F.2d 441, 443 (9th Cir. 1983).

9 When the evidence is ambiguous, or if the ALJ finds that the  
 10 record is inadequate to allow for proper evaluation, the ALJ has a  
 11 duty to "conduct an appropriate inquiry." Smolen v. Chater, 80 F.3d  
 12 1273, 1288 (9th Cir. 1996). Although the ALJ has a duty to develop  
 13 the record, the burden of proving disability remains on the claimant.  
 14 Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005).

15 Here, the ALJ found plaintiff had mild spondylosis at C5-6 and  
 16 C6-7, small rotary cuff tears in her shoulders, and sciaticia. (See  
 17 AR at 21, 231, 237, 256, 274). The ALJ found plaintiff's allegations  
 18 of disabling carpal tunnel syndrome and high blood pressure to be  
 19 without merit. (AR at 21). While Dr. Sobol did diagnose plaintiff  
 20 with carpal tunnel syndrome in April 2001, the ALJ's decision to  
 21 discredit his opinion of plaintiff's carpal tunnel was clearly laid  
 22 out in his decision and supported by substantial evidence in the  
 23 record. The ALJ noted that on January 6, 2004, plaintiff told Dr.  
 24 Small her right hand paresthesias had markedly improved and occurred  
 25 on an infrequent basis. (AR at 21, 167). In his decision, the ALJ  
 26 cites Dr. Small's examination of plaintiff and his results which  
 27 indicated no evidence of left carpal tunnel syndrome and results at  
 28

1 the upper limits of normal on plaintiff's right side. (AR at 21,  
 2 168). The ALJ also cited claimant's acknowledgment that she could  
 3 lift a toothbrush and personal care items, carry keys and a purse  
 4 every day, and drive a car every day. (AR at 21).

5 Furthermore, the record contains reports by Dr. Salick (AR 140-  
 6 41) and Dr. Sander (AR 298) that provide substantial medical support  
 7 for the ALJ's decision to reject Dr. Sobol's opinion.

8 The ALJ's decision to reject Dr. Sobol's opinion regarding the  
 9 severity of plaintiff's carpal tunnel syndrome was within his  
 10 discretion and supported by the specific and legitimate evidence  
 11 contained in Dr. Small's reports, which were cited in the decision,  
 12 and by substantial evidence in the record in the form of Dr. Salick's  
 13 and Dr. Sander's reports. Accordingly, the ALJ did not err in  
 14 rejecting Dr. Sobol's opinion regarding plaintiff's carpal tunnel  
 15 syndrome.

16 **F. Rejection of Plaintiff's Pain Testimony**

17 Plaintiff objects to the ALJ's determination that plaintiff  
 18 lacked credibility regarding her alleged functional limitations.  
 19 Defendant argues that the ALJ's credibility finding is supported by  
 20 substantial evidence and is entitled to deference.

21 Pain of sufficient severity caused by a medically diagnosed  
 22 "anatomical, physiological, or psychological abnormality" may serve as  
 23 the basis for a finding of disability. 42 U.S.C. § 423(d)(5)(A); see  
 24 Light, 119 F.3d at 792.

25 However, an ALJ need not believe every allegation of disabling  
 26 pain. See Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995). Where  
 27 there is no evidence of malingering, an ALJ may reject a claimant's

1 testimony regarding the severity of his or her symptoms only if the  
 2 ALJ sets forth legally permissible, specific, clear and convincing  
 3 reasons for doing so. Smolen v. Charter, 80 F.3d 1273, 1283-84 (9th  
 4 Cir. 1996). The ALJ must specifically identify what testimony is  
 5 credible and what evidence undermines the claimant's complaints.  
 6 Morgan v. Comm'r of the Social Security Admin., 169 F.3d 595, 599 (9th  
 7 Cir. 1999).

8 A finding that the claimant lacks credibility cannot be based  
 9 wholly on a lack of medical support for the severity of her pain.  
 10 Light, 119 F.3d at 792. A claimant need not produce evidence of pain  
 11 other than her own subjective testimony. Smolen, 80 F.3d at 1282.  
 12 Nor must a claimant present objective medical evidence of a causal  
 13 relationship between the impairment and the type of symptom. Id.;  
 14 Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995). Rather, the  
 15 claimant need only produce objective medical evidence of an underlying  
 16 impairment which could reasonably be expected to produce the pain or  
 17 other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341, 344 (9th  
 18 Cir. 1991) (en banc). This approach reflects the Ninth Circuit's  
 19 recognition of the "highly subjective and idiosyncratic nature of pain  
 20 and other such symptoms," such that "[t]he amount of pain caused by a  
 21 given physical impairment can vary greatly from individual to  
 22 individual." Smolen, 80 F.3d at 1282.

23 "An individual's statements about the intensity and persistence  
 24 of pain or other symptoms or about the effect the symptoms have on his  
 25 or her ability to work may not be disregarded solely because they are  
 26 not substantiated by objective medical evidence." SSR 96-7p.  
 27 Instead, a claimant must demonstrate only two things: objective  
 28 medical evidence of an impairment or impairments; and (2) that the

1 impairment or combination of impairments could reasonably be expected  
 2 to produce some degree of symptom, not that it did, in fact. SSR 96-  
 3 7p; see also SSR 96-3p.

4 When evaluating a claimant's credibility, the ALJ should consider  
 5 the claimant's reputation for lying, prior inconsistent statements  
 6 concerning the symptoms, and other testimony by the claimant that  
 7 appears less than candid; unexplained or inadequately explained  
 8 failure to seek treatment or to follow a prescribed course of  
 9 treatment; and the claimant's daily activities. Smolen, 80 F.3d at  
 10 1284. Conflicts in a claimant's statements or testimony support a  
 11 finding that the claimant lacks credibility. Fair v. Bowen, 885 F.2d  
 12 597, 604 n.5 (9th Cir. 1989).

13 With respect to daily activities, the Ninth Circuit has held that  
 14 a specific finding that a claimant is able to spend a substantial part  
 15 of her day engaged in pursuits involving the performance of physical  
 16 functions that are transferable to a work setting may be sufficient to  
 17 discredit a claimant's allegations of pain. Vertigan v. Halter, 260  
 18 F.3d 1044, 1049 (9th Cir. 2001). However, the Ninth Circuit cautioned  
 19 that "many home activities are not easily transferable to what may be  
 20 the more grueling environment of the workplace, where it might be  
 21 impossible to periodically rest or take medication." Fair v. Bowen,  
 22 885 F.2d at 603.

23 The Ninth Circuit has found that activities, such as grocery  
 24 shopping, driving a car, or limited walking for exercise do not "in  
 25 any way detract from [a claimant's] credibility as to [his or her]  
 26 overall disability." Vertigan, 260 F.3d at 1050. The Ninth Circuit  
 27 has repeatedly stated that a claimant need not be utterly  
 28 ///

1      incapacitated in order to be disabled under the Social Security Act.

2      See Fair, 885 F.2d at 603; Vertigan, 260 F.3d at 1050.

3           An ALJ's reasons for discrediting a claimant's testimony must be  
4          sufficiently specific for the reviewing court to assess whether the  
5          decision was impermissibly arbitrary. Bunnell, 947 F.2d at 345-56.  
6          As discussed below, taken as a whole, the ALJ's reasons for rejecting  
7          plaintiff's credibility withstand scrutiny.

8           The first and second reasons given in support of the ALJ's  
9          decision to reject plaintiff's credibility are the analyses of  
10         plaintiff's non-severe impairments and the analyses of Dr. Sobol's  
11         opinion that are included in the ALJ's decision, and incorporated by  
12         reference. (AR at 24-25). While a finding that plaintiff lacks  
13         credibility cannot be based wholly on the lack of medical support for  
14         the severity of her pain, the ALJ's analyses of plaintiff's non-severe  
15         impairments and of Dr. Sobol's opinion provide valid support for the  
16         conclusion that plaintiff's pain testimony lacks credibility.

17           Defendant notes that the inconsistencies found in plaintiff's  
18         complaints of debilitating carpal tunnel syndrome, high blood  
19         pressure, inability to concentrate and the medical evidence that  
20         caused the ALJ to label them "non-severe" indicate that plaintiff is  
21         prone to exaggerate her symptoms, which is a valid basis to reject  
22         plaintiff's credibility. See Smolen, 80 F.3d at 1284.

23           Similarly, the ALJ held that plaintiff's denial of arthalgias,  
24         soft tissue swelling, and localized joint pain on both November 20,  
25         2003 and April 29, 2005, was inconsistent with her claim that her pain  
26         is constant. (AR at 25). Such statements indicate plaintiff is prone  
27         to exaggerate symptoms, and is a valid basis to reject plaintiff's  
28         credibility.

1       Next, the ALJ stated that plaintiff's alleged symptoms are out of  
2 proportion with the objective physical findings. (AR at 25). In  
3 addition, the ALJ held that plaintiff "has not provided convincing  
4 details about factors which precipitate the allegedly disabling  
5 symptoms, claiming that her pain is constant." Id. In order to avoid  
6 having her statements regarding the intensity and persistence of pain  
7 discredited where there is no objective evidence of pain, plaintiff  
8 must demonstrate objective evidence of an impairment and that the  
9 impairment could reasonably be expected to produce some degree of  
10 symptoms. SSR 96-7p. The ALJ references the MRI studies of her  
11 cervical spine and left shoulder and cites Dr. Sobol's statement  
12 questioning the evidence of a tear in supraspinatus tendon of  
13 plaintiff's left shoulder. (AR at 25). As discussed above, evidence  
14 supporting plaintiff's habit of exaggeration and lack of candor  
15 regarding her symptoms support a finding that plaintiff's pain  
16 testimony is not credible.

17       The ALJ held that plaintiff made inconsistent statements  
18 regarding matters relevant to her disability. The ALJ noted  
19 inconsistencies in plaintiff's descriptions of her activities. (AR at  
20 25). A claimant's daily activities are relevant to a disability  
21 determination. Here, plaintiff's statement that she goes to church  
22 and bible study twice a week is technically inconsistent with her  
23 previous statement that she has no activities. However, limited  
24 activities, such as these, do not detract from a claimant's  
25 credibility as to her overall disability. See Vertigan, 260 F.3d at  
26 1050. Accordingly, evidence of one such inconsistent statement is  
27 harmless and does not negatively impact plaintiff's credibility. The  
28 ALJ notes plaintiff asserted Dr. Sobol had recommended surgery, but

1 that Dr. Sobol's records do not reflect such a recommendation. (AR at  
2 25). In order for the ALJ to use this as a basis to undermine  
3 plaintiff's credibility, the ALJ must, at the very least, make an  
4 attempt to obtain additional records from Dr. Sobol and verify that an  
5 inconsistency does indeed exist. There is no evidence in the record  
6 reflecting such an effort. In addition, the ALJ held that the fact  
7 that claimant's chiropractor reported on November 1, 2004 that the  
8 claimant had responded favorably to treatment indicate that her  
9 allegations of ongoing pain are not credible. (AR at 25). Here, too,  
10 the record is unclear regarding whether "responded favorably" is  
11 inconsistent with an allegation of ongoing pain. The ALJ must, at the  
12 very least, make an attempt to obtain additional records from the  
13 chiropractor to ensure an inconsistency truly exists if it is to serve  
14 as the basis for discounting claimant's credibility. Thus, any  
15 attempt to utilize these inconsistencies as the basis for a negative  
16 determination regarding plaintiff's credibility is error.

17 Finally, the ALJ held that plaintiff's "reported limited daily  
18 activities are outweighed by the other factors" discussed in his  
19 decision. Specifically, the ALJ discredited plaintiff's assertions  
20 that she has no activities based on his opinion that her allegedly  
21 limited daily activities cannot be objectively verified with any  
22 reasonable degree of certainty. The ALJ went on to state that even if  
23 her daily activities are truly as limited as she alleged, "it is  
24 difficult to attribute that degree of limitation to the claimant's  
25 medical condition, as opposed to other reasons, in view of the  
26 relatively weak medical evidence and other factors discussed in this  
27 decision." (AR at 25). In evaluating claimant's credibility, the ALJ  
28 must consider testimony by the claimant that appears to be less than

1 candid. See Smolen, 80 F.3d at 1284. The ALJ is in the best position  
2 to make such a determination and there is no indication in the record  
3 that the ALJ acted beyond his discretion in finding claimant's  
4 testimony regarding her daily activities not to be candid and reflect  
5 negatively on her credibility.

6 In sum, although the ALJ erred in citing the inconsistencies  
7 discussed above as a valid basis for a negative finding regarding  
8 claimant's credibility, in light of the other bases for such a  
9 finding, the Court finds the ALJ's error to be harmless. Thus, it  
10 cannot serve as grounds for remand. Burch v. Barnhart, 400 F.3d 676,  
11 679 (9th Cir. 2005).

12 **G. Remand is Required to Remedy Defects in the ALJ's Decision**

13 The choice of whether to reverse and remand for further  
14 administrative proceedings, or to reverse and simply award benefits,  
15 is within the discretion of the Court. McAlister v. Sullivan, 888  
16 F.2d 599, 603 (9th Cir. 1989). Remand is appropriate where additional  
17 proceedings would remedy defects in the ALJ's decision, and where the  
18 record should be developed more fully. Marcia v. Sullivan, 900 F.2d  
19 172, 176 (9th Cir. 1990).

20 Here, the Court finds remand appropriate. The ALJ failed to  
21 establish the credibility of the vocational expert and relied on his  
22 testimony in error. On remand, the ALJ must inquire whether the  
23 vocational expert's testimony conflicts with the DOT, and if it does,  
24 ensure the record contains persuasive evidence to support the  
25 vocational expert's credibility and such a deviation from the DOT.

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## **ORDER**

The Court, therefore, VACATES the decision of the Commissioner of Social Security Administration and REMANDS this action for further administrative proceedings consistent with this Memorandum Opinion and Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 17, 2006

/s/  
JENNIFER T. LUM  
UNITED STATES MAGISTRATE JUDGE